



## **Recommendation 91-8**

### **Adjudication of Civil Penalties Under the Federal Aviation Act**

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(Adopted December 12, 1991)

The Federal Aviation Administration is currently operating a demonstration civil penalty program under which the FAA may impose monetary penalties of up to \$50,000 for violations of the Federal Aviation Act or its regulations. Under the program, the FAA prosecutes violations, proposing initial civil money penalties according to the discretion of the prosecuting FAA official. The persons on whom the penalties would be imposed, usually pilots, air carriers, mechanics, or airport operators, are entitled to an administrative hearing before an administrative law judge at the Department of Transportation, followed by the right to an administrative appeal to the administrator of the FAA. Judicial review is available in the federal courts of appeals.

Before the demonstration civil penalty program was enacted in 1987, the FAA could propose civil money penalties, but such penalties could be imposed only through a civil action brought in a United States District Court through Justice Department attorneys.

The Federal Aviation Act also provides that violations of the Act or the regulations may result in suspensions or revocations of certificates of pilots, mechanics or air carriers. These cases follow a different administrative path. While "certificate actions" begin with a prosecutorial decision made by an FAA official, exercising the right to a hearing takes the case to the National Transportation Safety Board, an independent agency. If a hearing is requested, an NTSB ALJ holds the hearing, with a right to appeal to the Board. Judicial review is available in the federal courts of appeals.

In 1990, the Administrative Conference of the United States, in Recommendation 90-1, "Civil Money Penalties for Federal Aviation Violations," recommended the FAA administrative civil money penalty program be made permanent, that the \$50,000 ceiling on administratively imposed penalties be eliminated, and that the responsibility for adjudication be studied further. In response to the Conference's Recommendation 90-1, Congress extended the program for an additional two years. In that legislation, Public Law 101-370, Congress expressly asked the Conference to study and make a recommendation on the issue of "whether the authority to adjudicate administrative complaints under the Federal Aviation Act of 1958 should remain



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with the Department of Transportation, should be transferred to the NTSB, or should be otherwise modified."

### **Discussion**

Preliminarily, the Conference reiterates its previous recommendation that the civil money penalty program be made permanent and that the \$50,000 ceiling on administratively imposed penalties be removed.

The issues relating to how civil penalties should be adjudicated in the context of this program are controversial. There is no objectively correct resolution; nor do administrative law principles clearly lead to any single solution. Among the various (and not easily resolvable) concerns that arise in this context are:

—The regulated community has concerns about the fairness of FAA's administration of the civil money penalty program, resulting from the fact that appeals of civil penalty cases are heard by the FAA Administrator. The consultant's study, however, found no evidence of actual unfairness or mishandling of cases resulting from commingling prosecutorial and judging functions under the present system.

—The FAA is distinctive in its exercise of operational responsibility for the air traffic control system, which makes it a co-actor with persons or entities subject to its regulatory jurisdiction. The consultant's report noted a continuing perception that there is a conflict of interest between FAA as final adjudicator and its role as overseer of the air traffic control system.

—There is concern that cases based on similar facts being heard in two different agencies could have the potential for inconsistent standards and lead to forum shopping between the FAA civil money penalty program and the NTSB certificate revocation remedy.

—The FAA Administrator, as the Secretary of Transportation's delegate, is the chief policy maker in the area of air safety, and is charged with the responsibility for the safety of the national aviation system. The Administrator therefore has a legitimate interest in having some control over a related enforcement program.

The NTSB, in its role of recommending air safety improvements, benefits from its review of enforcement cases, as an opportunity to learn about potential safety problems in a context other than an accident investigation.



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The best resolution of the controversies associated with civil penalty adjudication authority would be a consensual one, satisfying the legitimate concerns of the FAA and the reasonable needs of all of the affected interests.<sup>1</sup> The Conference encourages the FAA Administrator and the NTSB Chairman to convene and jointly host a conference with representatives of affected public and private interests to consider negotiating solutions for allocating adjudicatory authority over the civil money penalty and certificate revocation and suspension programs. The Administrative Conference is available to assist as appropriate. If such a mutually agreeable resolution is developed in the future, the Conference's Committee on Adjudication is available to provide comments to Congress on the proposed solution.

Because the success of an aviation safety program ultimately rests on voluntary compliance, improving the relationships among the regulated communities, public representatives and the government agencies is crucial. Representatives of the FAA and NTSB indicate that the relationship between the two agencies is a cooperative one. To further this cooperative spirit, the Conference recommends that, in addition to meeting to discuss the specific issues of allocating adjudicatory authority for the civil money penalty and certificate programs, the FAA and NTSB should encourage long-term proposals for ways to enhance compliance and enforcement of the Act, through discussions and communication with the regulated community and the traveling public.

In the absence of a consensual resolution on the issue of where adjudicatory authority for FAA enforcement cases should reside, the Conference recommends that adjudicatory authority over a small percentage of selected civil money penalty cases (those involving pilots and flight engineers) be transferred to the NTSB. This recommended solution would address several problems. It would locate both civil money penalty and certificate authority for these cases in one forum, eliminating the potential for forum shopping as to pilots and flight engineers. It would eliminate perceived conflicts of interest as to those classes of cases in which conflict is most likely between FAA employees with operational responsibility for air traffic control and persons subject to civil penalty authority (i.e., pilots and flight engineers). While the unitary

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<sup>1</sup> The Conference held a public hearing on Wednesday, June 19, 1991, to provide interested parties with the opportunity to present their views on these issues. 56 Fed Reg. 22693 (May 16, 1991) (Notice of Conference Committee on Adjudication public hearing). After the Conference consultant released his draft report, he convened an informal meeting with affected parties to explore the feasibility of a solution to the controversy that accommodates the reasonable needs of all of the affected interests. Participants in that meeting agreed that informal consultation was desirable and the consultant met further with representatives of the affected interests to discuss alternatives. While no overall resolution was agreed to the willingness to seek common ground was enhanced.



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enforcement (rather than the split enforcement) model is used in almost all administrative civil money penalty programs, the FAA's distinctive role in administering the air traffic control system is a sufficiently special characteristic to provide plausible justification for recommending this limited expansion of the existing split-enforcement model in this context.

This recommendation to use a split-enforcement model in this particular situation is not to be read as a general endorsement of this model for other government programs. Rather, it reflects the specific circumstances involved here, including the fact the split-enforcement model is already in use in certificate cases, and the FAA has a significant operational role in air traffic control that may result in potential conflicts of interest in cases involving pilots or flight engineers.

Removing pilot and flight engineer cases from the FAA also conflicts the least with comprehensive exercise of FAA safety policy authority, given the individual character of most violations involved in these cases. Conversely, retaining civil penalty authority at the FAA for nonpilot and nonengineer cases, which constitute more than 75 percent of the civil money penalty cases, presents less potential for conflict between respondent interests and the FAA's air traffic control responsibility. There is also greater likelihood that the problems exposed by civil penalty actions in air carrier, airport security and hazardous materials cases are more systemic in nature.

For those cases within the Board's authority, the Conference is making additional recommendations. First, because a split-enforcement model involves one agency ruling on the actions of another, the Act should address the issue of the appropriate level of deference that should be given in enforcement cases to the FAA's interpretations of its rules. The Conference recommends deferring to validly adopted FAA interpretations of FAA regulations, unless such interpretations are arbitrary, capricious or not in accordance with law. This recommendation is consistent with Recommendation 86- 4, "The Split-Enforcement Model for Agency Enforcement." See also *Martin v. Occupational Safety and Health Review Commission*, U.S. 111 S. Ct. 1171 (1991). This does not, however, mean that NTSB should simply defer to litigation positions of the FAA prosecutor. *Id.* at 1179. In addition, the FAA should be given the authority to appeal to the Board from adverse NTSB decisions at the administrative law judge level and to seek judicial review in the appropriate court of appeals from decisions of the Board. The FAA is still the chief policy making agency in the area of aviation safety, and should have the ability to challenge decisions it believes are inconsistent with those policies.



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The merger of sanction authority over pilots and flight engineers in one forum should provide the NTSB with increased flexibility to select the appropriate sanction from the range of available sanctions. However, such flexibility must operate within the bounds of FAA's validly adopted standards and criteria for sanctions. Such criteria may, as with all rules, be adopted through the appropriate rulemaking procedures or through adjudications.<sup>2</sup> In addition, a potential respondent must be on notice of the range of potential sanctions for which he or she potentially would be liable.

The Conference also encourages greater use of a variety of dispute resolution techniques in individual cases. The Administrative Dispute Resolution Act, Public Law No. 101-552, encourages agencies to use such techniques where appropriate. The growing body of alternative dispute resolution literature supports the view that efficiency gains for everyone are available from flexible means of resolving disputes. Such flexibility might be useful in a variety of contexts in civil money penalty and certificate cases. The Conference specifically recommends consideration of the utility of settlement judge procedures.<sup>3</sup>

### Recommendation

1. Congress should make permanent the civil money penalty program for violations of the Federal Aviation Act (the Act) and eliminate the \$50,000 ceiling on administratively imposed penalties.<sup>4</sup>

2. The question of where adjudicatory authority over certification and civil money penalty proceedings under the Act should be placed raises complicated policy as well as legal issues. Principles of administrative law provide no single clear answer. The Federal Aviation Administration Administrator and the Chairman of the National Transportation Safety Board jointly should convene a conference with representatives of affected interests to consider possible consensual arrangements for allocating adjudicatory authority over the civil money penalty and certificate suspension and revocation programs. The FAA and the NTSB should also encourage long-term proposals for enhancing compliance and enforcement of the Act, and for changing the procedures to achieve the Act's objectives.

<sup>2</sup> See *SEC v. Chenery*, 332 U.S. 194 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

<sup>3</sup> See Conference Recommendations 88-5. "Agency Use of Settlement Judges," 1 CFR 305.88-5 (1991).

<sup>4</sup> See ACUS Recommendation 90-1. "Civil Money Penalties for Federal Aviation Safety Violations," 1 CFR 305.90-1 (1991).



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3. In the absence of consensus by the affected agencies and interests as to where the Act's certification and civil money penalty proceedings should be adjudicated, Congress should amend the Act consistent with the following recommendations:

A. Authority for adjudicating civil money penalties against pilots and flight engineers should be transferred from the FAA to the NTSB, with all other civil penalty adjudication authority remaining at the FAA. This recommendation is contingent on Congress' transfer of necessary budgetary resources for this purpose to the NTSB.

B. The Act should provide that, for purposes of review of FAA enforcement actions, courts and the NTSB should defer to validly adopted FAA interpretations of its statutes and regulations, unless it is shown that such interpretations are arbitrary, capricious, or otherwise not in accordance with the law.<sup>5</sup>

C. The FAA should be given the right to appeal an NTSB administrative law judge decision to the Board, and to seek judicial review of a decision of the Board in the appropriate court of appeals.

This recommendation is directed only to this specific program and the special circumstances involved, and should not be read as implying any views as to the merits, generally, of the "split enforcement" model as compared to the "unitary agency" model of adjudication in other government programs.

4. In an NTSB adjudication under the Act, the range of possible sanctions for violations of the Act should include certificate revocation, certificate suspension and/or a monetary penalty, as found by the NTSB to be appropriate and consistent with rules validly adopted by the FAA with respect to applicable standards or criteria for the imposition of sanctions. Notice of possible sanctions, as well as those proposed by the FAA in a particular enforcement matter, should be provided to the respondent upon the institution of the proceeding. The selected sanction(s) should be set forth in the ALJ's initial or recommended decision, together with the bases therefore, including a reference to any applicable FAA standard or criterion for the imposition of sanctions.

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<sup>5</sup> See ACUS Recommendation 86-4, "The Split-Enforcement Model for Agency Enforcement." 1"CFR 305.86-4 (1991). See also *Martin v. OSHRC.* \_U.S. \_; 111 S. Ct. 1171 (1991). This Recommendation should not be read to suggest that deference should automatically be given to FAA prosecutors' litigation positions. *Id.* at 1179.



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5. NTSB and FAA adjudicators, as well as FAA prosecutors, should place greater emphasis on alternative dispute resolution in individual cases. In particular, the FAA and NTSB, to the extent each has adjudicatory responsibility, should consider Recommendation 88-5, "Agency Use of Settlement Judges," and make greater use of the techniques described there.

### **Citations:**

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